No. 75-508

Supreme Court, U. S.
FILED
DEC 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

EMIL W. KAEDERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-508

EMIL W. KAESERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims erred in holding that the denial of his claims by the Army Board for the Correction of Military Records was not arbitrary or capricious, and that accordingly, he was not entitled to back pay and disability retirement pay.

Petitioner served as an officer in the Army of the United States during World War II. In 1946, he received a terminal leave promotion to major but remained on active duty as a captain until 1948 when

he was released at his request, at which time his status reverted to that of a major in the United States Army Reserve. He subsequently unsuccessfully sought recall to active duty as a captain. Petitioner then enlisted in the Regular Army as a master sergeant. He re-enlisted periodically until his retirement as a master sergeant in 1966. His retirement was based on length of service.[1]

During his years of service in the Regular Army, petitioner unsuccessfully sought recall to active duty as an officer, retirement for physical disability, and "correction" of his military records to show that he should have been retired in 1948 as a major on grounds of physical disability. Following his retirement, petitioner was awarded a 30 percent disability rating by the Veterans Administration, and he thereupon requested "correction" of his military records to show his retirement on grounds of physical disability rather than length of service. This request was denied by the Army Board for the Correction of Military Records.

Petitioner then filed this action for review in the Court of Claims. The court remanded to the Board for a hearing on petitioner's claims. The Board denied relief after a hearing and consideration of a medical report from the Surgeon General. The Board concluded that petitioner's 30 percent disability, which was based upon a physical condition dating from World War II, had been sufficient to preclude

[1] Petitioner had earlier retired from his reserve commission after being passed over for promotion.

his recall to active duty as an officer but was not sufficient to justify discharge for physical disability once he had re-enlisted. The Court of Claims affirmed those findings as not arbitrary or capricious (Pet. App. 1-7).

The decision of the Court of Claims on the merits was correct[2] and the essentially factual questions raised by petitioner warrant no further review.

Petitioner seeks back pay and accrued retirement benefits on alternative grounds. First, if he was physically fit in 1948, he argues that he should have been recalled to duty as an officer and is therefore entitled to an officer's pay for the entire period of his service as an enlisted man. Second, if he was not fit to serve as an officer, he claims that it was because he was so disabled as of 1948 that he should have been retired, either then or in 1966, in the highest temporary grade, that of major, in which he served satisfactorily.[3]

The Board correctly ruled that in 1948 there was little need to recall officers of petitioner's grade and military occupational speciality (Conclusion 2). Thus

[2] We do not here concede that the Court of Claims had jurisdiction over this case, which does not involve a claim to "actual, presently due money damages from the United States." *United States* v. *King*, 395 U.S. 1, 3. See our brief in *United States* v. *Testan and Zarrilli*, No. 74-753, argued November 12, 1975.

[3] The amended petition in the Court of Claims sought disability retirement pay as a major from January 1966. Petitioner claimed before the Board that he was entitled to retirement pay as a colonel, but he later abandoned that claim (Pet. 22-25).

even if petitioner had been medically fit for recall, he was not entitled to recall. Moreover, as the court below observed, even if petitioner had been recalled as an officer, "it would be impossible to say how long [petitioner] would have served or what rank he would have attained" (Pet. App. 4).

In any event, petitioner was not medically qualified for recall as an officer. He suffered from a disabling back condition (Findings 2(z)). No statute requires the Army to fill its rolls with officers having physical limitations. Moreover, as the Board noted, even during the Korean War, when there was a greater need for officers, "not all individuals in [petitioner's] circumstances received favorable consideration of their requests for active duty, and the impression that he had a [disabling back condition] was sufficient to disqualify him for active duty in commissioned status" (Conclusion 3). As the Board also observed, however, this disqualification from recall as an active duty officer did not establish that he was disabled for the purpose of serving as an enlisted man (Findings 2(p), (q)).

It follows that even though the Surgeon General's 1974 report found that petitioner "was not medically qualified for entry on [active duty] commencing in 1948" by reason of his back condition (Findings 2 (z)), he nevertheless was medically fit to continue service as an enlisted man and therefore was properly retired for longevity rather than disability in 1966 (Conclusion 5). Since he was not retired for disability, he is not entitled to retirement pay under his former rank of major.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 599520 174